

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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JOHN D. HERTZBERG,

Plaintiff-Appellee/Cross-Appellant,

v

GALENA KATZ,

Defendant-Appellant/Cross-  
Appellee.

UNPUBLISHED

October 8, 2013

No. 306208

Oakland Circuit Court

LC No. 2010-767542-DM

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Before: GLEICHER, P.J., and RONAYNE KRAUSE and RIORDAN, JJ.

PER CURIAM.

Defendant, Galena Katz, appeals as of right the trial court's judgment of divorce for defendant's marriage with plaintiff, John D. Hertzberg, and its ruling regarding property division, child support, denial of attorney fees, and the admission of evidence. Plaintiff filed a cross-appeal, also challenging the trial court's division of property, child support award, and denial of attorney fees. We affirm in part but because the trial court's findings preclude a meaningful appellate review, we remand for further proceedings consistent with this opinion.

**I. FACTUAL BACKGROUND**

The parties were married in 2004 and had one child together in 2006. Plaintiff was a self-employed attorney and defendant owned a retail business in East Lansing, where she sold various items including synthetic marijuana products. For various reasons, the parties' relationship deteriorated and plaintiff filed a complaint for divorce in 2010. The ensuing litigation was protracted and contentious, with each party alleging significant misconduct by the other.<sup>1</sup>

The trial spanned several months and included voluminous exhibits. The trial court found there was a breakdown of the marriage, with neither party bearing more fault. The trial

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<sup>1</sup> At some point, plaintiff was arrested for an alleged incident of domestic violence against defendant. Plaintiff was charged, but asserted that it was defendant who assaulted him and that she falsely accused him. Defendant denied that charge and maintained that plaintiff hit her. Plaintiff eventually was acquitted of the charges.

court found the following to be separate assets: (1) plaintiff's law practice, which was operating at a deficiency and had no value or appreciation during the marriage; (3) defendant's business that but for the now illegal sale of K2,<sup>2</sup> had no significant appreciation. The trial court found the following to be marital assets: (1) the marital home worth less than the current mortgage of approximately \$610,000; (2) plaintiff's interest in Penthouse Philadelphia (an adult entertainment club located in Philadelphia); (3) plaintiff's 401(k) and IRA, valued at approximately \$292,527 (although the \$50,000 plaintiff took out against his 401(k) plan belonged to him alone); (4) defendant's IRA at Comerica, valued at between \$25,000 and \$30,000; (5) bank accounts; (6) defendant's 2008 Buick Enclave that exceeded the mileage limit on the lease; (7) plaintiff's 2006 BMW 330ci; and (8) three life insurance policies of plaintiffs that had no cash value. The trial court listed the marital debt as the Wells Fargo equity line of credit with a current balance of \$34,994.

Plaintiff was awarded the marital home and its contents, his Charter One bank account, his 2006 BMW, his three life insurance policies, and was ordered to pay all credit card debt in his name. Defendant was awarded her Buick Enclave and had to buy out the lease or turn it in early, her Comerica IRA, her bank account, and was ordered to pay all credit card debt in her name. The trial court did not award Penthouse Philadelphia to either party. The trial court also found that because defendant had misrepresented her financial need during the pendency of the action, she had to pay half of the marital expenses from March 6, 2010, which the trial court calculated to be half of \$70,495, based on exhibits 62, 63, and 64. The trial court did not provide any reasons for why the division was equitable.

The trial court also ordered defendant to pay \$755.08 a month in child support. The trial court found that defendant's income was \$389,335. That represented the average between the estimate from plaintiff's expert witness, \$500,000, and the estimate from defendant's expert witness, \$278,671. The trial court calculated plaintiff's income to be \$163,524, which accounted for his income and the cash available to him from the shareholder loan that he took from his law firm.

There also was significant evidence at trial that both parties had been underreporting their assets. Defendant's expert witness testified that there were significant discrepancies between plaintiff's claimed income and expenses. A forensic accountant testifying on behalf of plaintiff stated that based on a review of defendant's business, it was evident that she had not been reporting all of her income.

The trial court issued an amended opinion and order and entered a judgment of divorce, disposing of the issues of the division of the marital estate, custody, child support, and attorney fees. While defendant filed a motion to amend the judgment, the trial court issued an opinion and order with further clarification of its ruling, and denied defendant's motion. Defendant now appeals on several grounds, challenging the division of the marital estate, the determination of income for child support payments, the admission of certain testimony, and the denial of attorney

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<sup>2</sup> K2 is a synthetic marijuana product that defendant sold in her store. Effective October 1, 2010, MCL 333.7212 was amended to include the compounds of K2 as a schedule 1 substance.

fees. On cross-appeal, plaintiff raises issues relating to the division of the marital estate, the determination of income for child support payments, and the denial of attorney fees.

## II. PROPERTY DIVISION

### A. Standard of Review

“In a divorce action, this Court’s review of the trial court’s factual findings is limited to clear error. A finding is clearly erroneous if, after a review of the entire record, the reviewing court is left with a definite and firm conviction that a mistake has been made.” *McNamara v Horner (After Remand)*, 255 Mich App 667, 669; 662 NW2d 436 (2003) (quotation marks and citation omitted). This Court also reviews for clear error the trial court’s findings regarding whether a particular asset is marital or separate property. *Woodington v Shokoohi*, 288 Mich App 352, 357; 792 NW2d 63 (2010). “If the trial court’s findings of fact are upheld, the appellate court must decide whether the dispositive ruling was fair and equitable in light of those facts. The court’s dispositional ruling should be affirmed unless this Court is left with the firm conviction that the division was inequitable.” *Id.* at 355-356 (quotation marks and citation omitted).

### B. Analysis

While the trial court properly valued the assets and ordered reimbursement, from the trial court record, this Court is unable to determine whether the division was fair and equitable.<sup>3</sup>

When dividing property in a divorce, the trial court first must determine if each asset is marital or separate property. *Woodington*, 288 Mich App at 358. “Marital assets are those that came to either party by reason of the marriage.” *Id.* (quotation marks and citation omitted). “[A]ssets earned by a spouse during the marriage, whether they are received during the existence of the marriage or after the judgment of divorce, are properly considered part of the marital estate.” *McNamara*, 255 Mich App at 670. Generally, marital assets are subject to division, but separate assets are not. *Skelly v Skelly*, 286 Mich App 578, 582; 780 NW2d 368 (2009); see also *Woodington*, 288 Mich App at 358.

“The goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances.” *Loutts v Loutts*, 298 Mich App 21, 35; 826 NW2d 152 (2012) (quotation marks and citation omitted). The trial court should be guided by general principles of equity and its ultimate disposition must be fair and just. *Id.* “To reach an equitable division of marital property, a trial court should consider the duration of the marriage, the contribution of each party to the marital estate, each party’s station in life, each party’s earning ability, each party’s age, health and needs, fault or past misconduct, and any other equitable circumstance.” *Woodington*, 288 Mich App at 363. What factors are relevant will vary with each case, and no one factor should be given undue weight. *Id.* “Hence, there is

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<sup>3</sup> Defendant proffers many allegations throughout her facts section, but we will focus only on those arguments properly raised in her issues presented and discussion section. MCR 7.212.

no rigid framework for applying the relevant factors.” *McNamara v Horner*, 249 Mich App 177, 185-186; 642 NW2d 385 (2002). “The trial court must make specific findings regarding the factors it determines to be relevant.” *Woodington*, 288 Mich App at 363-364.

Defendant first avers that Penthouse Philadelphia was worth at least \$130,000, and the trial court erred in finding otherwise. In its initial judgment, the trial court did not award this asset to either party. In its opinion and order denying defendant’s motion for an amended judgment, the trial court explained that it did not award the Penthouse Philadelphia investment to either party because it “has no value.” At trial, plaintiff testified that his investment in that venture was transformed into an employment agreement, but that he had received none of the agreed upon money. Plaintiff further testified that he was not expecting any money from that asset, as his business associate had threatened to kill him if he initiated proceedings to enforce the agreement. However, the existence of a threat does not equate to the asset having no value. The trial court’s failure to award this asset was the equivalent of awarding it to plaintiff, who now will receive any profit derived from it, however unlikely. Therefore, the trial court erred in failing to value or award this asset.

Defendant also contends that the trial court erred in failing to account for the \$76,000 that she alleges plaintiff stole from her and in forcing her to reimburse plaintiff \$35,247.50 for marital expenses accrued from March 2010 to December 2010. However, as the trial court found, plaintiff accounted for the \$76,000 from a lockbox hidden in the marital home, which he used on marital expenses. The court further justified its decision to order reimbursement because defendant misrepresented her financial need during the pendency of the litigation. As discussed more fully in the context of attorney fees, the record sufficiently demonstrated that defendant underreported her income throughout the marriage. Thus, there was no error in the trial court’s finding.<sup>4</sup>

In regard to the overall division of the marital estate, defendant argues that the trial court awarded plaintiff 97 percent of the assets, which was inequitable. Plaintiff retorts that he only received 84 percent of the marital assets. The trial court gave some reasons for its award of the assets to each party. The trial court stated that the marital house had a negative value of \$72,494, and that defendant had not demonstrated her ability to prequalify for a mortgage, so it awarded the house to plaintiff. The trial court also found that plaintiff’s e-trade accounts were established before the marriage, and plaintiff only vaguely testified about how they were funded, including funds from litigation that plaintiff initiated before the marriage but received during the marriage. The trial court further found that neither party presented evidence regarding the household furnishings, which were awarded to plaintiff.

However, despite this limited insight into the trial court’s rulings, “[w]e are unable to discern the trial court’s general plan in dividing assets” or if there was a general plan.

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<sup>4</sup> While defendant challenges that the trial court did not explain its calculations, the court specifically referenced exhibits 62, 63, and 65, which listed plaintiff’s expenses, and the court explained that it did not include expenses before March 2010. The court provided further clarification in its opinion denying defendant’s motion for an amended judgment.

*Woodington*, 288 Mich App at 365. There is no evidence that the trial court viewed the marital estate as a whole or divided it according to an overall equitable division. “[T]he trial court did not divide the marital estate on a percentage basis, nor did it explain its general basis for determining an equitable division of property.” *Woodington*, 288 Mich App at 365. By plaintiff’s own calculations, he was awarded 84 percent of the property, and we are left wondering why the trial court found that to be equitable.

Further, with the exception of finding that fault was equally shared, the trial court merely referenced the general equity factors without giving any indication of which, if any, guided its overall division of marital assets.<sup>5</sup> As this Court stated in *Woodington*, 288 Mich App at 363-364, “[t]he trial court must make specific findings regarding the factors it determines to be relevant.” While there is some evidence on record regarding the general factors of equity, in reaching its decision there are no findings of fact regarding these factors in the record. In addition, there is no finding that indicates that the trial court used other general principles of equity that might have been relevant to the property division. *McNamara*, 249 Mich App at 186 (citations omitted). This case involved a lengthy trial replete with allegations of wrongdoing, such as intentionally hiding assets and failing to contribute to the marital estate. Yet, the trial court did not indicate whether it gave credence to these allegations, or what other equitable factors may have influenced the overall division. The trial court also made no general finding that the division of the estate was equitable.

Because the trial court did not identify reasons for the equity of the overall division, it is impossible for this Court to determine whether the trial court clearly erred. Moreover, further clarification is necessary regarding plaintiff’s e-trade accounts, valued at \$292,527. Because this asset was one of the few that had significant value, the trial court’s decision to award it solely to plaintiff significantly impacted the distribution of the estate. In its amended opinion and order, the trial court found that plaintiff’s e-trade accounts were marital property, but awarded them to plaintiff with no explanation. In its order denying defendant’s motion to amend the judgment, the trial court stated that the parties presented limited testimony regarding how these accounts were established, that they were established before the marriage, and plaintiff vaguely testified that he used some of the proceeds that were “earned prior to the marriage” but received during the marriage to fund the account. This explanation, however, seems more consistent with treating plaintiff’s e-trade accounts like separate property, earned and established before the marriage, which conflicts with the trial court’s finding that this was marital property. Thus, remanding is necessary for the trial court to articulate its findings regarding why the division of the marital estate was equitable or what an equitable division would be.

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<sup>5</sup> See *Woodington*, 288 Mich App at 363 “a trial court should consider the duration of the marriage, the contribution of each party to the marital estate, each party’s station in life, each party’s earning ability, each party’s age, health and needs, fault or past misconduct, and any other equitable circumstance.”

Plaintiff also contends that the trial court should consider defendant's business in its decision.<sup>6</sup> According to plaintiff, defendant's property should have been invaded and divided as part of the marital estate.<sup>7</sup> As this Court recognized in *Skelly*, 286 Mich App at 582:

Separate assets may be invaded when one of two statutory exceptions are met: MCL 552.23, MCL 552.401. Invasion is allowed under MCL 552.23 when one party demonstrates additional need, meaning that the property awarded to that party is insufficient for her suitable support and maintenance. Invasion is allowed under MCL 552.401 when one party significantly assists in the acquisition or growth of the other party's separate asset, in which case the court may consider the contribution as having a distinct value deserving of compensation. [(Quotation marks, brackets, and citations omitted).]

In regard to MCL 552.401, plaintiff contends that because he bore the brunt of the marital expenses, defendant was able to grow her business, and plaintiff was thus entitled to part of that business. However, the link between plaintiff bearing the marital expenses and the growth of defendant's business is tenuous at best. The evidence established that any increased value was because of the sale of K2, and plaintiff presented no evidence that the discovery or sale of K2 was facilitated by his contributions at home. Furthermore, his argument overlooks evidence that defendant also contributed to their marital existence, albeit in a different way. Defendant testified that she almost exclusively raised their child during the first year of his life, and was the primary caregiver thereafter. Thus, as both parties contributed to the marital existence, there is no reason to conclude that either's contribution resulted in an increase in their respective businesses.

However, plaintiff also contends that invasion would be warranted under MCL 552.23, as he has additional need of financial support. Because remanding is necessary for the trial court to articulate or alter the division of the marital estate, it would be premature for us to decide whether additional financial need exists. Upon remand, the trial court should also consider whether invasion into defendant's separate property is warranted.

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<sup>6</sup> Defendant claims that plaintiff has waived this issue because he testified that he did not care about defendant's business. This misconstrues plaintiff's testimony. While plaintiff testified that he could not care less about defendant's business, he also testified that to make him whole, he believed he was entitled to \$400,000. Since the trial court declined to award plaintiff the requested amount, he was not made whole as requested and is entitled to argue that other assets should have been awarded to make him whole.

<sup>7</sup> However, defendant's business was not marital property because she owned it before the marriage, and funds were not comingled. There is no evidence that this was a marital asset that came to plaintiff by reason of the marriage. *Woodington*, 288 Mich App at 358.

### III. CHILD SUPPORT

#### A. Standard of Review

A trial court's determination of income is reviewed for an abuse of discretion. *Berger v Berger*, 277 Mich App 700, 723, 726; 747 NW2d 336 (2008). We review for clear error the trial court's findings underlying the child support award. *Id.* at 723. This Court reviews de novo whether the trial court properly interpreted the Michigan Child Support Formula (MCSF) and applied it to the facts of the case. *Borowsky v Borowsky*, 273 Mich App 666, 672; 733 NW2d 71 (2007). This Court also reviews for an abuse of discretion a trial court's discretionary rulings permitted by statute or the MCSF, and a trial court abuses its discretion when it selects an outcome outside the range of reasonable and principled outcomes. *Berger*, 277 Mich App at 723.

#### B. Analysis

A child has a right to receive financial support from his parents, and a trial court may enforce that right by ordering parents to pay such. *Borowsky*, 273 Mich App at 672-673. The court must order child support in accordance with the child support formulas. *Id.* at 673. The first step in awarding child support is to determine each party's income. *Stallworth v Stallworth*, 275 Mich App 282, 284; 738 NW2d 264 (2007). "Under the MCSF, the stated objective for determining a parent's income is to establish, as accurately as possible, how much money a parent should have available for support." *Clarke v Clarke*, 297 Mich App 172, 179; 823 NW2d 318 (2012) (quotation marks and citation omitted). Generally, a court determines a party's income by ascertaining the actual resources of each parent. *Stallworth*, 275 Mich App at 284. "When deciding whether to impute income to an individual, a trial court must consider the following factors: employment experience, educational level, physical and mental disabilities, whether the parties' children reside in the individual's home, availability of employment, wage rates, special skills and training, and whether the individual can actually earn the imputed income." *Id.* at 286.

In this case, the trial court relied on the report from Bruce Knapp, defendant's expert in valuation, accounting, and forensic accounting, who calculated defendant's income in 2010 to be \$278,671. The trial court also relied on evidence from Mary Ade, plaintiff's expert in valuation, who projected defendant's income in 2010 to be \$500,000. However, both parties object to the method of calculation, as the trial court merely averaged the income estimates of each expert, totaling \$389,335.

Simply averaging the estimates of two experts is not factfinding pursuant to MCR 2.517(A). See e.g. *Corcoran v Corcoran*, 462 Mich 851; 611 NW2d 800 (2000); see also *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 176; 530 NW2d 772 (1995) (pursuant to MCR 2.517(A)(2), a trial court's findings are sufficient only if "it appears that the trial court was aware of the issues in the case and correctly applied the law, and where appellate review would not be facilitated by requiring further explanation."). Here, the trial court made no findings regarding what method of calculation it found to be reasonable. From the trial court's ruling, there is simply no way for this Court to determine whether either, or which, of the experts

engaged in a valid method of calculation. Thus, remanding for further clarification and calculation of defendant's income is necessary.

Defendant also objects to the calculation of plaintiff's income. The trial court found that plaintiff earned \$106,737 from his law firm, consistent with evidence from Knapp.<sup>8</sup> The trial court also included the money plaintiff received from his shareholder loan, finding that plaintiff had additional cash available to him. To support its findings, the trial court cited the 2008 MCSF manual, § 2.01(C)(2)(a), which states that income may include:

(2) Earnings generated from a business, partnership, contract, self-employment, or other similar arrangement, or from rentals.

(a) Income (or losses) from a corporation should be carefully examined to determine the extent to which they were historically passed on to the parent or used merely as a tax strategy.

Consistent with the trial court's findings, testimony at trial established that plaintiff was drawing cash from this shareholder loan and did so because if categorized as personal income, he would have had to pay taxes on it. Knapp specifically testified that the shareholder loan was the same in 2008 and 2009, but increased by over \$56,000 in 2010, implying that plaintiff had additional cash available to him in 2010. Knapp also testified that while there had been periods of repayment, the general trend was that the shareholder loan was increasing. Thus, the trial court made "a factual determination that [plaintiff's] *actual* income was higher than what [he] reported[.]" *Stallworth*, 275 Mich App at 285 (emphasis in original). We find no error requiring reversal.<sup>9</sup>

#### IV. PRIVATE INVESTIGATOR

##### A. Standard of Review

"We review decisions regarding the admission of rebuttal testimony for an abuse of discretion." *Winiemko v Valenti*, 203 Mich App 411, 418; 513 NW2d 181 (1994). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008).

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<sup>8</sup> Ade, plaintiff's expert, testified that plaintiff's income hovered around \$100,000 from 2007 through 2010. While the parties also dispute the trial court's failure to rely on Seymour Adler's testimony, we find no error, as the trial court simply relied on the expert evidence that it found to be credible. See *Stallworth*, 275 Mich App at 286 (the trial court was in the best position to judge the credibility of the evidence).

<sup>9</sup> Though defendant argues that she was denied full discovery and plaintiff prevented her from fully accessing his records, she did provide expert testimony regarding plaintiff's income, which the trial court found credible. Moreover, defendant also was able to produce significant testimony that plaintiff's expenses exceeded his income and presented it to the trial court.



## B. Analysis

Defendant argues that the trial court erred in allowing the private investigator, Timothy Lennon, to testify as a rebuttal witness regarding defendant's presence at MGM Casino. Even if this was improper rebuttal testimony, any error was harmless beyond a reasonable doubt. MCR 2.613.

First, this was a bench trial, and a judge is presumed to possess an understanding of the law and recognize the difference between admissible and inadmissible evidence. *In re Forfeiture of \$19,250*, 209 Mich App 20, 31; 530 NW2d 759 (1995). Furthermore, the trial court subsequently struck most of Lennon's testimony after he was unable to provide the underlying data to substantiate his testimony. The court ruled that only the portion of Lennon's testimony based on personal knowledge, when he actually observed defendant's car, was admissible.

Moreover, even if the admission of any of Lennon's testimony was improper, reversal is still not warranted. Lennon's testimony was primarily offered to show that defendant was unfit to parent the minor child, as she was spending nights at the casino. Yet, defendant is not challenging custody on appeal. Furthermore, defendant actually testified that she had an interest in gambling, would go to MGM a couple of times a week, and that she was a player's club member at MGM. She also testified that there might have been times where she stayed all night at the casino. In light of this independent evidence of defendant's gambling, it cannot be said that Lennon's testimony was so damaging that it constitutes error requiring reversal.

## V. ATTORNEY FEES

### A. Standard of Review

We review a trial court's denial of attorney fees for an abuse of discretion, which occurs when the court's decision falls outside the range of reasonable and principled outcomes. *Ewald v Ewald*, 292 Mich App 706, 724-725; 810 NW2d 396 (2011). We review any findings of facts underlying the decision for clear error and we review questions of law de novo. *Id.*; *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005). "A finding is clearly erroneous if, on all the evidence, the Court is left with the definite and firm conviction that a mistake has been made." *Kar v Nanda*, 291 Mich App 284, 287; 805 NW2d 609 (2011) (quotation marks and citation omitted).

## B. Analysis

Defendant and plaintiff both object to the trial court's denial of their request for attorney fees. "Under the American rule, attorney fees are not recoverable as an element of costs or damages unless expressly allowed by statute, court rule, common-law exception, or contract." *Reed*, 265 Mich App at 164 (quotations omitted). "Attorney fees are not recoverable as of right in a divorce action but may be awarded to enable a party to carry on or defend the action." *Ewald*, 292 Mich App at 724; *Stackhouse v Stackhouse*, 193 Mich App 437, 445; 484 NW2d 723 (1992). "In domestic relations cases, attorney fees are authorized by both statute, MCL 552.13, and court rule, MCR 3.206(C)." *Smith v Smith*, 278 Mich App 198, 207; 748 NW2d 258 (2008) (quotation marks and citation omitted).

Pursuant to MCR 3.206(C)(2):

(2) A party who requests attorney fees and expenses must allege facts sufficient to show that

(a) the party is unable to bear the expense of the action, and that the other party is able to pay, or

(b) the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply.

Thus, according to MCR 3.206(C)(2)(a), “[a] party seeking attorney fees must establish both financial need and the ability of the other party to pay.” *Ewald*, 292 Mich App at 724.<sup>10</sup> The party requesting attorney fees bears the burden of showing facts sufficient to justify the award. *Id.* at 725.

Here, the trial court found that both parties had adequate financial resources to pay their own attorney fees. This ruling was not in error. The evidence at trial demonstrated that there was a pervasive underreporting of income in this case. Plaintiff admitted that while he received \$225,000 from a settlement in 2005, he failed to report that on his 1040 form. He also acknowledged that he had access to cash, he kept at least \$50,000 of cash throughout the house, and he received numerous loans from acquaintances with no corroborating documentation. Defendant also offered extensive testimony from Knapp that plaintiff’s alleged income was inconsistent with his claimed expenses.

Likewise, there was significant evidence of defendant’s failure to report her income fully. Defendant admitted that she failed to file tax returns from 2005 through 2007 because she was very busy those years. Plaintiff also produced significant evidence demonstrating that defendant had not been accurately reporting her income, as Seymour Adler testified that upon review of defendant’s financial documents, he concluded that “there was a vast understatement of both sales and income in the tax returns as compared to the ledger sheets.” In light of the significant evidence that both parties had been less than forthcoming about their available income and financial resources, it cannot be said that the trial court erred in concluding that neither had demonstrated sufficient financial need.<sup>11</sup>

However, financial need is not the only basis for which attorney fees may be awarded. “This Court has also held that an award of legal fees is authorized where the party requesting payment of the fees has been forced to incur them as a result of the other party’s unreasonable

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<sup>10</sup> MCL 552.13(1) allows a court to order a party “to pay any sums necessary to enable the adverse party to carry on or defend the action, during its pendency.”

<sup>11</sup> Because both parties had sufficient funds from their incomes, whether the division of marital property on remand is altered does not affect the outcome of this issue.

conduct in the course of the litigation.” *Stackhouse*, 193 Mich App at 445; see also *Borowsky*, 273 Mich App at 687. To justify awarding attorney fees under this rule, a trial court must find that a party’s misconduct actually caused the fees to be incurred. *Reed*, 265 Mich App at 165.

Both parties repeatedly alleged that the other had engaged in misconduct that warranted attorney fees.<sup>12</sup> Yet, the trial court made no findings regarding whether there was any misconduct, or whether that misconduct caused fees to be incurred. Merely because the trial was lengthy or because significant evidence was presented does not necessarily mean there was misconduct. *Reed*, 265 Mich App at 165 (quotation marks and citation omitted) (“misconduct cannot be predicated on good-faith efforts to admit evidence.”). However, the trial court simply failed to rule on the issue, which was error.

## VI. CONCLUSION

While we affirm the trial court’s decision not to credit defendant \$76,000 from the lockbox, we remand for the trial court to clarify why it found the division of the overall marital estate equitable or to divide it equitably. The trial court also should value and award the Penthouse Philadelphia asset in its ruling. While we agree that defendant’s business was separate property that should not be invaded under MCL 552.401, we remand for a finding of whether invasion is justified under MCL 552.23, for additional need. We affirm the trial court’s calculation of plaintiff’s income but remand for further factual findings regarding the calculation of defendant’s income. We find no error requiring reversal in the limited admission of Lennon’s testimony. Lastly, while we affirm the trial court’s denial of attorney fees based on financial need, we remand for a finding on whether attorney fees are justified due to either party’s misconduct.

We have reviewed any remaining arguments in the parties’ briefs and found them to be without merit. Affirmed in part and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher  
/s/ Amy Ronayne Krause  
/s/ Michael J. Riordan

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<sup>12</sup> In his proposed findings, plaintiff stated that one of the issues presented was the amount defendant should contribute to his legal fees and costs “due to her fraudulent acts.” In defendant’s proposed findings, she claimed that she, not plaintiff, was entitled to fees due to numerous instances of plaintiff’s misconduct, including his admission that most of the litigation costs were unnecessary and the fact that he tried the case through conjecture and speculation.